Iah Sin Seng v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPLICATION NO 44–2 OF 2003–II
LAU BEE LAN JC
20 JUNE 2003

Criminal Procedure — Bail — Non-bailable offence — Bail pending appeal — Factors to be considered in granting bail pending appeal

The applicant was convicted and sentenced in the sessions court to three years' imprisonment, two strokes of the rotan and a fine of RM30,000, in default one year's imprisonment, for an offence under s 372A of the Penal Code. The applicant applied for a stay of execution pending an appeal to the High Court against both conviction and sentence. The application was rejected. No grounds for such rejection were recorded by the sessions court judge. The applicant applied to the High Court for a stay pending appeal pursuant to s 311 of the CPC. The appellant simultaneously applied for bail pending appeal pursuant to s 389 of the CPC. The deputy public prosecutor objected to the application.

Held, allowing the application and releasing him on bail of RM30,000 with two sureties:

(1) It is trite law that the granting of bail by the lower court is a matter of discretion of the magistrate or president concerned. Factors which should guide the subordinate courts in granting or refusing bail pending appeal in cases where a term of imprisonment has been imposed are as laid out in of Ganesan v Public Prosecutor [1983] 2 MLJ 369 (see paras 7–8).

(2) In the instant case, the offence under s 372A of the Penal Code, though non-bailable was not unbailable. Further, the applicant had a clean record being a first offender and had promised not to be involved in any other offence should he be released on bail. There were also no written grounds as to why the sessions court judge had rejected the applicant's application. The distinction drawn by the deputy public prosecutor that an offence under s 372A of the Penal Code was somewhat unique from sexual offences because it involved a question of morality, was rather lame. In the circumstances, the applicant's application should be allowed and the applicant be released on bail in the sum of RM30,000 with two sureties (see paras 9, 12, 14, 17 and 19).

[Bahasa Malaysia summary

Pemohon dituduh dan dihukum di mahkamah sesyen kepada tiga tahun penjara, dua kali rotan dan denda sebanyak RM30,000, jika ingkar satu tahun penjara, untuk satu kesalahan di bawah s 372A Kanun Keseksaan. Pemohon memohon untuk satu penggantungan perlaksanaan sementara menunggu rayuan ke Mahkamah Tinggi terhadap kedua-dua sabitan dan hukuman. Permohonan itu ditolak. Tiada sebab direkodkan untuk penolakan itu oleh hakim mahkamah sesyen, Pemohon memohon

ke Mahkamah Tinggi untuk satu penggantungan sementara menunggu rayuan menurut s 311 Kanun Acara Jenayah ('KAJ'). Pada masa yang sama pemohon juga memohon untuk jaminan sementara menunggu rayuan menurut s 389 KAJ. Penolong kanan pendakwaraya membangkang kepada permohonan itu.

Diputuskan, membenarkan permohonan tersebut dan melepaskan beliau atas ikat jamin RM30,000 dengan dua orang penjamin:

(1) Adalah undang-undang yang mantap bahawa pemberian jaminan oleh mahkamah rendah adalah budi bicara majistret atau presiden tertentu. Faktor-faktor yang membantu mahkamah rendah dalam memberi atau menolak ikat jamin sementara menunggu rayuan dalam kes-kes di mana tempoh penjara telah diberi adalah seperti dalam kes Ganesan v Public Prosecutor [1983] 2 MLJ 369 (lihat perenggan 7–8).

(2) Dalam kes ini, kesalahaan di bawah s 372A Kanun Keseksaan, walaupun tak boleh dijamin (non-bailable) bukan suatu yang tidak dapat dijamin (unbailable). Lagipun, pemohon mempunyai rekod yang bersih kerana pertama kali melakukan kesalahan dan berjanji tidak akan melibatkan diri dalam kesalahan-kesalahan yang lain sekiranya dilepaskan di bawah jaminan. Tiada asas bertulis kenapa hakim mahkamah sesyen menolak permohonan pemohon. Perbezaan yang dinyatakan oleh penolong kanan pendakwaraya bahawa kesalahan di bawah s 372A Kanun Keseksaan beza daripada kesalahan seksual kerana ia melibatkan soalan moral tidak masuk akal. Dalam keadaan ini, permohonan pemohon sepatutnya diberi dan pemohon dilepaskan atas ikat jamin berjumlah RM30,000 dengan dua penjamin (lihat perenggan 9, 12, 14, 17 dan 19).]

Notes

For cases on non-bailable offences, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 819–853.

Cases referred to

Drin bin Bojei & Ors Criminal Application No 44–06–III(II), High Court Kuching (refd)

Ganesan v Public Prosecutor [1983] 2 MLJ 369 (folld)

Rex v Tan Tee [1948] MLJ 154 (refd)

Safri Koboy & Anor Criminal Application No 44–03–98–III(I), High Court Kuching (refd)

Legislation referred to

Criminal Procedure Code ss 311, 388(i), 389

Penal Code s 372A(1)

Appeal from: Case No SC–62–115 of 2003–I (Sessions Court, Kuching)

Roger Chin (Osman Ibrahim with him) (Roger Chin & Co) for the applicant.

Awang Armadajaya (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Lau Bee Lan JC:

[1] This is an application by way of notice of motion (encl 2) by the applicant, Iah Sin Heng to this court for:

(a) an order that execution of the judgment of the sessions court given on 13 May 2003 be stayed pursuant to s 311 of the Criminal Procedure Code ('CPC'); and

(b) the applicant to be released on bail pending an appeal to the High Court pursuant to s 389 of the CPC.

[2] The applicant, who was acting in person during his trial before the sessions court, was found guilty at the conclusion of the trial. On the said date, 13 May 2003, the applicant at the stage of submitting plea of mitigation was represented by Mr Roger Chin of Messrs Roger Chin & Co. The applicant was imposed a sentence of three years imprisonment, whipping of two strokes of rotan and fined RM30,000 in default one year imprisonment.

[3] The learned counsel, Mr Roger Chin, upon instructions had applied to the learned sessions court judge for stay of execution pending an appeal to the High Court against both conviction and sentence but was rejected. Hence, the application to this court.

[4] Before me, Mr Roger Chin together with Encik Osman Ibrahim, as counsel for the applicant submitted that the application should be allowed on essentially the following grounds:

(a) The court has the discretion to grant stay of execution pending appeal to the High Court. The case of *Rex v Tan Tee* [1948] MLJ 154 was cited. Premised on this authority, it was submitted that as the applicant is a businessman, married, has dependents, in particular his aged parents, it is unlikely that he would abscond;

(b) The applicant never failed to attend for trial up to this stage and had never failed to turn up on time;

(c) The applicant had a clear antecedent and was not of a bad character;

(d) This was the first offence committed and the applicant would not be involved in other offences while at liberty;

(e) The applicant had given full cooperation to the police throughout the investigation of the case and during the trial at the lower court;

(f) The curial security imposed by the court will ensure the attendance of the applicant before the appellate court; and

(g) As the applicant is now appealing, it would be in the interest of justice.

[5] The court's attention was also drawn to the authorities of *Ganesan v Public Prosecutor* [1983] 2 MLJ 369, *Mallal's Criminal Procedure* (4th Ed) (referred to in *Ganesan*), two Criminal Applications of the High Court of Kuching, ie*Safri Koboy & Anor* No 44–03–98–III(I) and *Drin bin Bojei & Ors* No 44–06–III(II).

[6] The learned DPP, Encik Awang Armadajaya, objected to the application. Whilst not disagreeing to the principles in Ganesan which served as a guide to the lower courts with regard to the granting or refusing of bail pending appeal in cases where a term of imprisonment has been imposed, he submitted that the application should be dismissed. The grounds of the learned DPP are as follows:

(a) The offence committed by the applicant and of which he was convicted and sentenced was a non-bailable offence; hence bail is not as of right. It was a case of a unique nature, being one of a morality issue. It was different from a sexual offence as it does not involve the issue of victimizing anyone as it involved all parties, including the applicant, who consented to the commission of the offence. From the gravity point of view, it should be viewed not only in terms of imprisonment, strokes of the rotan or fine imposed but should be viewed from the angle of the effect on the public at large, the physical well-being of the members of the public or its emotional, spiritual or moral well-being;

(b) The length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard is vitiated by the circular of the Chief Justice directing that priority should be given to remand cases;

(c) No mention in the affidavit in support of the notice of motion that bail was applied for in the sessions court and was rejected. Therefore, we cannot assume that such an application was made;

(d) Nothing in the affidavit to indicate there would be difficult points of law involved; and

(e) The fact that the applicant is a businessman-cum-family man is not a highly relevant factor. It has to be considered and would be relevant if the factors adverted to in Ganesan were on a scale of 50:50 basis.

[7] It is trite law that the granting of bail by the lower court is a matter of discretion of the magistrate or president concerned (see *Ganesan* at p 2 of the bundle of authorities ('BOA') of the applicant (encl 8)).

[8] Having said that, the next point to consider are the principles which have been succinctly enunciated by his Lordship, Mohamed Dzaiddin J (as he then was) in Ganesan. His Lordship had stipulated the factors which should guide the subordinate courts in granting or refusing bail pending appeal in cases where a term of imprisonment has been imposed, as follows:

(1) gravity or otherwise o f the offence;

(2) the length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard;

(3) whether there are difficult points of law;

(4) whether the accused is a first offender or has previous conviction;

(5) whether the accused would become involved again in another offence whilst at liberty; and

(6) whether the security imposed will ensure the attendance of the appellant before the appellate court.

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[9] As to the gravity of the offence, it is no doubt a serious offence as can be seen from the kind of sentence provided under s 372A(1) of the Penal Code. I agree with the learned counsel, Encik Osman that although it is a non-bailable offence, it is not an unbailable offence. In this context, s 388(i) of the CPC provides that:

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> When any person [is] accused of any non-bailable offence is arrested, he may be released on bail by the Court, but he shall not be so released if there appeared reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.

C **[10]** In the instant case, the offence of which the applicant was found guilty and convicted provides that it shall be punishable with imprisonment which may extend for a 10 term to 15 years and with whipping, and shall also be liable to a fine. Thus, the applicant is not caught by the exception under s 388(i) of the CPC.

[11] Although there is the circular where priority is to be given to remand cases, it D cannot be denied that since the imposition of the sentence on the applicant on 13 May 2003, the appeal records are yet to be prepared and a date is yet to be fixed for the hearing of the appeal.

[12] It is undisputed that the applicant has a clean record being a first offender and has promised not to be involved in any other offence should he be at liberty.

E **[13]** The court would agree with the learned DPP that there appears to be no mention of an application for bail made to the learned sessions court judge in the affidavit in support of Mr Roger Chin. However on a query from the court, he had replied that he had applied for a stay of execution of the sentence and that his client be released on bail and that he even told the learned sessions court judge that the F purpose of the bail is only to secure the attendance of the accused. It would have been prudent of the learned counsel to have stated this fact in his affidavit in support. Be that as it may, the court would take the learned counsel's statement from the Bar in good faith under the five circumstances.

[14] I do not know why the learned sessions court judge rejected the application G as there are no grounds stated. However, again from the learned counsel, Mr Roger Chin, in answer to the court's query, stated that the application was rejected because the prosecuting officer objected that his client be released on bail for the reason that there is a sentence of imprisonment and a heavy fine imposed by the court.

[15] This situation, however, does not preclude me from considering the H application as his Lordship Mohamed Dzaiddin J in *Ganesan* in a similar application was faced with a similar situation when he stated (at p 369):

> I do not know the reason why the learned President has refused this application. The only conceivable reason, I could think of was that she has imposed a prison sentence against the applicant.

I **[16]** In fact, in the instant case, that appears to be the reason of the learned sessions court judge rejecting the application for stay of execution and for bail. Nevertheless, reverting to *Ganesan*, it is to be noted that his Lordship, Mohamed Dzaiddin J granted the application for a stay of execution wherein the applicant was released on bail in the sum of RM3,000 with two sureties.

[17] The distinction attempted to be drawn by the learned DPP that an offence under s 372A of the Penal Code is somewhat unique from the sexual offences because it involves a question of morality, with due respect, is rather lame. According to the *Shorter Oxford English Dictionary on Historical Principles*, Vol II, at p 1354, the word 'moral' is defined as, inter alia, 'of or pertaining to character or disposition; of or pertaining to the distinction between right and wrong, or good or evil, in relation to actions, violation, or character; ethical' and 'virtuous with regard to sexual conduct'.

[18] Based on the definition, all other offences in relation to property and even sexual offences, to my mind, would impinge on the issue of morality, ie whether the conduct is ethical, right or wrong and good or evil.

[19] Under the circumstances, in the light of the above reasons as stated, I allow the applicant's application and also order that the applicant be released on bail in the sum of RM30,000 with two sureties.

Application allowed. Applicant released on bail of RM30,000 with two sureties.

Reported by John Paul Simon